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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**In re T.R et al., Persons Coming Under
the Juvenile Court Law.**

**SAN MATEO COUNTY HUMAN
SERVICES AGENCY,**

Plaintiff and Respondent,

v.

DEANNA R.,

Defendant and Appellant.

A122815

**(San Mateo County
Super. Ct. Nos. 64090, 76221)**

Deanna R. (Mother) appeals the termination of her parental rights over her daughter, A.R., born in May 2001, and placement of her daughter, T.R., born in November 1994, in long-term foster care.¹ She contends the juvenile court erred in denying her petition to modify. (Welf. & Inst. Code, § 388.)² In addition, she argues the order terminating her parental rights over A.R. is not supported by substantial evidence given her continuous parental relationship with A.R., the court failed to adequately consider the “sibling exception” to parental termination (§ 366.26, subd. (c)(1)(B)(v)),³

¹ The parental rights of David R. (Father) over A.R. were also terminated, but he is not a party to this appeal. Mother and Father are collectively referred to as Parents.

² All undesignated section references are to the Welfare and Institutions Code.

³ Formerly section 366.26, subdivision (c)(1)(E). (See Stats. 2005, ch. 640, § 6.5.)

and the finding that T.R. is adoptable is not supported by substantial evidence. We reject the contentions and affirm.

BACKGROUND

Dependency Petitions

On October 13, 2006, the San Mateo County Human Services Agency (Agency) filed the original juvenile dependency petitions regarding the minors. On November 1, following the detention hearing, amended petitions were filed under section 300, subdivision (b) (failure to protect), and subdivision (d) (sexual abuse). An additional count under subdivision (c) (serious emotional damage) was alleged solely as to A.R. The petitions alleged that A.R. had been sexually abused by the minors' adult brother, who lived in the home. Mother, who is developmentally delayed, believed A.R.'s allegation of sexual abuse but failed to protect her, and Father did not believe A.R. The petitions also alleged that Parents had a history of permitting the minors to engage in and witness inappropriate sexual material and activity. The petitions also alleged that Father, a convicted felon and registered sex offender, had a history of physically and emotionally abusing Mother, who was fearful of him, and Father had threatened the family counselor with harm. The petition regarding A.R. alleged she had demonstrated emotionally disturbed behaviors including use of sexually explicit language, age-inappropriate knowledge of adult sexual acts, cruelty toward animals, and physical aggression toward peers.

On November 17, 2006, second amended petitions (the operative petitions) were filed containing these additional allegations: On November 14, Father threatened to take unidentified children hostage, "exchange them with law enforcement," and hang himself. Father was hospitalized under section 5150. Mother knew of Father's plan for several days but failed to intervene.

Disposition Report

The Agency's November 2006 disposition report noted numerous prior referrals between 1997 and 2004 and a prior dependency. It indicated Father has three prior felony convictions, T.R. was previously made a dependent of the court due to her then

14-year-old brother's sexual relationship with an adult residing in the home, A.R. was recently molested by an adult brother, and there was a history of domestic violence between Parents.

Mother said she had been employed full time for 14 years at a grocery store that had recently closed. Father said he was unemployed and on disability. During visits, the minors interacted comfortably with Parents and Parents interacted appropriately with the minors. Parents wanted the minors returned to their care.

Mother and T.R. have received services at Golden Gate Regional Center (GGRC) and both have been diagnosed with mild mental retardation. An October 2006 mental health evaluation of A.R. noted she was very uncooperative during testing, but her test results indicated she has “ ‘serious problems in reality testing or perceptual accuracy,’ mood difficulties, and difficulties interacting with people in realistic and meaningful ways.” A.R. was diagnosed with “Oppositional Defiant Disorder, Provisional.” Play therapy for A.R. was recommended as well as parenting education for Parents. An October 2006 mental health evaluation of T.R. stated that test results indicated anxiety, depression, coping deficits, cognitive impairments, and perceptual impairments. She was diagnosed with mild mental retardation, and adjustment disorder with mixed anxiety and depression. Play therapy for T.R. was recommended. The minors were residing in separate foster homes.

A November 2006 mental health evaluation of Father resulted in diagnoses of mild mental retardation and “major depressive disorder, moderate, chronic.” It was also noted that Father had long-standing lapses in judgment and parenting capacity. Father was placed on a section 5150 hold after disclosing thoughts of hanging himself in front of a church, taking school children hostage, and doing a “full body cavity search” on police officers.

The Agency social worker opined that Father's mental health status posed a risk to the minors and that Mother was unable to protect the minors from him. Reunification services to Parents were recommended, including mental health services for Parents and the minors and continued supervised visits.

Following the joint jurisdictional/dispositional hearing on November 28, 2006, Mother submitted on the petitions, they were sustained and the court declared the minors dependents of the court.⁴ The court ordered reunification services and interim and six-month reviews.

Interim Review

The Agency's February 2007 interim review report noted the minors had recently been placed in the same foster home. T.R. had consistently requested to "go back home," but these requests had lessened since she was placed with A.R. Both minors appeared to enjoy the visits with Parents. Parents had been compliant with their case plans and attended all visits. However, the Agency opined that the minors should remain dependents of the court since more time was needed in order to assess Parents' ability to parent appropriately, and for Parents to gain insight as to the effect of their developmental delays on their parenting. The court continued the minors as dependents and gave the Agency discretion to increase Parents' visits.

Six-Month Review

The Agency's May 2007 six-month status review report stated that Parents appeared to be doing well, completed parenting classes, and had a new apartment. They also were attending weekly individual therapy. Mother was working full time. The minors were doing well despite having been moved to separate foster homes earlier that month. The placement change was necessary because their joint foster mother felt the minors needed more attention. The social worker noted that when placed together the minors needed a tremendous amount of supervision and their behaviors negatively influenced each other. T.R.'s teacher noted that T.R.'s social skills were lacking and T.R. presented with anxious and nervous behavior. A psychological evaluation was recommended because T.R. reported hearing voices telling her what to do. Although Father completed the parenting class, his participation was minimal, making it difficult to

⁴ The reporters transcript from this hearing is not contained in the appellate record.

assess his parenting strengths and weaknesses. Parents had been present for all visits with the minors and were appropriate with them.

The Agency social worker opined that it remained unclear how much Parents understand the role they played in failing to protect the minors. In addition, it was not clear that Parents had the parenting ability or insight to meet the minors' emotional and behavioral needs. Continued reunification services were recommended. At the six-month review hearing the minors were continued as dependents and remained in foster care.⁵

Twelve-Month Review

The Agency's November 2007 12-month review report noted that T.R. had moved to a new foster home in October because her prior foster parents experienced "burn out." She had adjusted well to the new home. A.R. was doing well in her continuing foster placement. The Agency concluded the minors did better when they were placed separately.

The Agency social worker stated that while Parents had complied with court orders and participated in the services ordered, they had failed to benefit from services. Although Father had attended numerous therapy sessions, the therapist could not assess whether the minors would be at risk under Father's parental supervision. Mother's therapist noted that Mother was "severely limited in her ability to gain insight through individual psychotherapy." The therapist also was concerned about Mother's passivity regarding decisions surrounding the minors and her dependency on Father.

Parents were consistent in their visits, although Father's demeanor and statements during the visits appeared to be an attempt to control the minors' verbalizations, emotions, and behavior. Father failed to set a good example for the minors by littering at the park and kicking an item accidentally dropped by a stranger. However, the minors appeared to enjoy their visits. The Agency social worker was concerned that Father disregarded the minors' concerns regarding animals in the home, including a centipede

⁵ The reporters transcript from this hearing is not contained in the appellate record.

that T.R. feared, dead snakes kept in the freezer, and a hedgehog illegally kept as a pet. The social worker was also concerned about Father's sexual inappropriateness around the minors, including letting then 12-year-old T.R. lie on him straddling his neck with her legs during park visits. He saw nothing wrong with hanging pictures of naked adults on the wall of the family home. He also appeared to "yell[]" at and "badger[]" Mother regarding decisions around finances and grocery shopping.

The adoptions social worker stated that although the minors were doing well in their separate foster homes, there were concerns about their individualized special needs and their ability to manage their behavioral issues if placed in the same home.

The social worker concluded that although Parents loved the minors, they did not make sound and safe decisions to ensure the minors' safety. In addition, Parents' relationship was "turbulent" and "intimidating." The social worker recommended termination of reunification services, the minors' continued placement out of the home, and a section 366.26 hearing. At the 12-month review hearing the court terminated reunification services for Parents and set a section 366.26 permanency planning hearing (hereafter .26 hearing) for June 3, 2008.⁶

Section 388 Petition

On June 2, 2008, the day before the scheduled .26 hearing, Mother filed a section 388 petition requesting the minors' return to her custody and a resumption of family reunification services. The petition alleged Father moved out of the home in April; and Mother remained in the home alone, maintained her full-time job, and received 25 hours per week of parenting services. The petition also alleged the minors were bonded to her, would benefit from her "love and nurturing" and their sibling relationship would be negatively impacted by differing permanent plans.

Attached to the section 388 petition was a May 30, 2008 letter from Katherine Arnsbarger, "DD Services Coordinator" of the A.P.P.L.E. FamilyWorks program (FamilyWorks). The letter noted that Mother understands the need to protect the minors

⁶ The reporters transcript from this hearing is not contained in the appellate record.

and as a result, Father moved out of the home. It also noted that Father was agreeable to spending time with Mother and the minors once during weekdays and on weekends. Arnsbarger opined that, as Mother continues with the Family Works program, she will “safely and very adequately” parent the minors.

Section 388 Hearing

At the September 2008 hearing on the section 388 petition, Arnsbarger testified that Mother had been living independently of Father since April. Arnsbarger last visited Mother in April but did not observe her with the minors. The home was safe for the minors and FamilyWorks made sure Mother paid her bills. Arnsbarger described Mother as cooperative, compliant with keeping appointments and following instructions, and “high functioning within her developmental condition.” On cross-examination, Arnsbarger said she had never met the minors and knew nothing about A.R.’s mental health status or needs. She also had never met or talked to Father, and had not investigated whether Father or anyone other than Mother was living in the home.

Agency social worker Cicely Ferlatte testified that when she last was at Mother’s home, two months prior to the hearing, she did not see Father in the home. Ferlatte could neither confirm or deny that Mother was living without Father. Ferlatte had not spoken with Father since reunification services were terminated. Mother had told Ferlatte that the best way to contact Father was through Mother’s address, and Father never provided Ferlatte a different address. On cross-examination, Ferlatte testified it would not be in A.R.’s best interest to be returned to Mother’s home even if Father was out of the home because more time was necessary to assess A.R.’s interaction with Mother in Mother’s home. Ferlatte said A.R. was doing “great” in her foster home and was bonded to her current caregivers. She also said it would be detrimental to remove A.R. from her current placement and return her to Mother. Ferlatte said she also had continuing concerns about Mother’s ability to parent T.R., even if Father had been out of the home since April. The social worker had continuing concerns about Mother’s ability, without Father, to provide T.R. housing, child care, medical needs, and advocacy at individualized educational plan meetings. The social worker was also concerned about Mother’s ability to protect T.R.

from Father if Parents resumed living together. Although Mother requested visits with the minors separate from Father, she preferred to have longer, joint visits with Father rather than shorter visits without Father.

Mother testified she lived alone in her home and the lease had been changed to her name. She said Father had moved out in April 2008 and was living in Mountain View with his minor son. She said she believed she could keep him out of her home permanently and would get a restraining order against him if she had to. She said moving Father out was designed to protect the minor's safety, but Father being in the house was not unsafe for the minors. She also said Father had done nothing to cause her to tell him to move out.

Father testified he was living at an address in Menlo Park and then corrected himself to say Mountain View. He said he moved out of Mother's house in May 2008 so she could "get the [minors] back safely." He never notified the social workers of his change of address because Mother said she would do so. He also said he and Mother had no plans to divorce.

T.R. testified she wanted to return to Mother because she loves her. She also said she wanted to live with Father and hoped he and Mother will get back together. T.R. said she liked her visits with A.R. and wanted to live with her even though A.R. sometimes "drives [her] nuts." T.R. said that if she could not return home with Parents, she still wanted visits with Mother.

A.R.'s counsel argued that returning A.R. to Mother or giving Mother more services was not in A.R.'s interest because A.R. needed a high level of vigilant supervision and there was no evidence that Mother could meet A.R.'s needs. Moreover, Mother did not currently perceive Father to be any risk to the minors. A.R.'s counsel also noted that, although A.R.'s ongoing relationship with T.R. was important, it would not be detrimental to A.R. if the minors had different dispositions because it had been necessary to place the minors in separate foster homes because of their behavior and the risks they sometimes pose to each other. T.R.'s counsel joined the arguments of A.R.'s counsel in opposing Mother's section 388 petition.

The court denied the section 388 petition, finding that Mother had not met her burden of proof.

.26 Hearing Report

The Agency's May 2008 .26 hearing report stated FamilyWorks was no longer providing services to the minors, and instead was providing services to Mother. The Agency social worker stated she would continue to advocate with GGRC for T.R. to continue to receive services. T.R. had an individualized educational plan and was seen as generally by herself and quiet at school. A.R. was not a GGRC client and was developmentally on track. The minors' separate placements were stable. T.R.'s foster parents were committed to being T.R.'s long-term placement and A.R.'s foster parents were willing to adopt A.R. Based on the supervised joint visits with Mother and Father, the social worker felt that Mother had difficulty making decisions on her own and for the minors without Father.

According to the adoptions social worker, T.R. and A.R. were each more "stabilized and organized in their behavior" due to placement in separate foster homes. The social worker said the minors "do not have an exceptionally close relationship. [A.R.] attempts to engage her big sister, but [T.R.] tends to dismiss her or find her annoying." The social worker attributed this to their age difference and the history of family dynamics. The social worker opined that while the minors' relationship "is not close," she recommended that they maintain a connection over time. She noted that continuation of the sibling relationship has been a priority in identifying permanent placements for the minors. Both minors had developed healthy, positive relationships with their caregivers resulting in emotional, cognitive and social gains. T.R. had developed a close relationship with a same-age foster sister and had expressed a desire to stay with her current caregivers until adulthood. T.R. also said her relationships with Parents were important to her, and she wanted to continue those relationships while residing with her current foster parents.

The social worker stated that T.R.'s special needs, including her age and cognitive and social skill delays, make identifying an adoptive home difficult. The social worker

also opined that moving T.R. from her current environment would be detrimental to her. A.R. has developed strong relationships with each of her foster parents and they hope to adopt her. A.R. appeared quieter and less assertive of her personality and needs during visits with Parents. She does not appear to be strongly bonded to Parents and does not look to them to meet her needs. Therefore, the social worker opined it would not be detrimental to A.R. to terminate Parents' parental rights over her. A.R.'s foster parents were committed to maintaining contact between A.R. and T.R. and open to the possibility of some contact with Parents. A.R. refers to her foster parents as her "parents."

The social worker recommended termination of parental rights as to A.R., adoption as the permanent plan for A.R., and long-term foster care as the permanent plan for T.R. as the best way to provide them with emotional and mental stability in their homes and ensure their physical and emotional safety on a consistent basis. The social worker also opined, "through careful consultation with collaterals, caregivers, and supervisor, that at this time, visitation start to be decreased for both children, . . . ultimately ceased for [A.R.,] and [T.R.] continue to have visitation with [Mother]."

Addendum to .26 Hearing Report

A September 2008 addendum to the Agency's .26 hearing report stated that the minors continued to reside in separate foster homes. Parents continued to come to visits, bringing lunch and clothes or school supplies for the minors. Father appeared to be distant during the visits and at the most recent visit became very emotional and had to be asked to step out. T.R. then became very emotional and concerned about Father. In July, A.R.'s foster parents committed to adopting A.R. and expressed their willingness to explore future contact with Parents.

The social worker continued to recommend termination of parental rights and adoption for A.R., and a long-term placement of legal guardianship for T.R.

.26 Hearing

The Agency relied on the documents and oral testimony presented on the section 388 motion. Social worker Ferlatte testified that approximately once a month the minors spend the night at each other's foster placements and they "definitely do care for each

other.” She said according to T.R., A.R. “drives her crazy, but [T.R.] loves A.R.” Ferlatte also said that A.R.’s foster parents have always been encouraging of the minors’ sibling relationship. When asked if the minors’ sibling bond was “strong,” Ferlatte said their sibling bond was “good.” She recommended that parental rights over A.R. be terminated, and that A.R.’s adoptive parents make an effort to continue visits between the minors, including transporting the minors together and continuing the minors’ overnight visits.

Ferlatte explained that, over the last two years, there were concerns of possible inappropriate sexual contact between the minors and that they were negatively influencing each other’s behavior. When they were placed together their foster parents felt they could not leave the minors alone together in a room for any period of time. At that time it was necessary to separate them to provide them the best supervision and keep them safe. There was also resentment between the minors because Mother “significantly favored” T.R. over A.R. Ferlatte also said that the minors’ behaviors improved and their sexualized behaviors decreased when they were placed separately. She also said that until A.R.’s adoption is final, visitation with Mother would help her transition to adoption.

Adoptions social worker Michaela Harrington testified that A.R.’s foster-adoption parents have expressed an interest in meeting Mother, are open to considering ongoing visitation between A.R. and Mother, and have been very active in supporting the minors’ continued relationship. She did not think that the foster parents would sever the siblings’ relationship after adopting A.R. Harrington said that A.R. had gone through a lot of anxiety-producing “ambiguity” regarding her future, and opined that A.R.’s need for permanency and stability outweighs any of the statutory exceptions to adoption. She had no question that A.R. is adoptable. Harrington said A.R. was very excited about and “very much wanted” to continue being part of her current foster family. Harrington also said that guardianship as a permanent plan would create too much anxiety for A.R. and that adoption would provide A.R. the clarity and boundaries she needs to “move forward.” Harrington said that the minors’ sibling relationship was not “the closest of

relationships [she had] observed,” but said it was a valuable relationship. Harrington opined that because of the family dynamics prior to the current dependency, it was not the most positive sibling relationship for A.R. and, therefore, losing the sibling relationship would not be detrimental to her. Harrington said it was more important for A.R. to have the permanency and stability of adoption. She also opined that adoption is the best permanent plan for A.R. even if the foster parents did not continue the minors’ sibling contact. She did not think that A.R. would suffer any detriment if the minors’ legal relationship was severed. Harrington also recommended that A.R.’s visitation with Father terminate because of concerns about his boundaries with the minors.

At the conclusion of the .26 hearing, A.R.’s counsel argued there was no evidence that A.R. would suffer such detriment from termination of Parents’ parental rights as to outweigh the benefits of adoption. T.R.’s counsel argued in favor of the sibling exception as to T.R. and argued that T.R. should visit Mother and Father separately.

The court concluded there was clear and convincing evidence that A.R. is likely to be adopted and terminated Parents’ parental rights over her. It also found that the parental and sibling bond exceptions to adoption did not override A.R.’s need for adoption and permanency. The court stated T.R. was “adoptable,”⁷ but T.R. objected to termination of Parents’ parental rights over her. Thus, the court did not terminate Parents’ parental rights over T.R. It ordered T.R. placed in continued foster care and ordered the Agency to continue to work with Mother to develop her parenting skills with the goal of T.R. returning to her without Father being in the home. It also ordered T.R.’s continued visits with Mother, and left T.R.’s supervised visits with Father at the Agency’s discretion. It ordered the Agency to provide sibling visits to continue outside the presence of Parents, terminated Father’s visitation of A.R. and permitted Mother visitation with A.R. at the Agency’s discretion.

⁷ The court’s form order from the .26 hearing did not check the box which states “[t]here is clear and convincing evidence that it is likely [T.R.] will be adopted.”

DISCUSSION

I. *Mother's Section 388 Petition Was Properly Denied*

Mother contends the court erred in denying her section 388 petition. She argues the court did not articulate whether it applied a preponderance of the evidence standard or a clear and convincing evidence standard in denying the petition. She also argues that her petition established changed circumstances and granting it is in the minors' best interests.

Section 388 provides, in relevant part: “(a) Any parent . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made The petition shall be verified and . . . shall set forth in concise language any change of circumstance or new evidence which [is] alleged to require the change of order or termination of jurisdiction.” The party seeking modification of a prior court order has the burden of showing, by a preponderance of the evidence, changed circumstances or new evidence. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317; Cal. Rules of Court, rule 5.570(h).) The court may consider the entire factual and procedural history of the case in determining whether the section 388 petition makes the requisite showing. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189.)

The court's section 388 determination is reviewed for abuse of discretion. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415-416; *In re S.M.* (2004) 118 Cal.App.4th 1108, 1119.) “ ‘ [“]The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.’ ” [Citation.]” (*In re Stephanie M., supra*, 7 Cal.4th at pp. 318-319.)

Mother first argues that, in denying the section 388 petition, the court stated she had not met her burden of proof, but did not state the standard. However, the court expressly asked Mother's counsel what the standard was for Mother's burden of proof and Mother's counsel and A.R.'s counsel both stated it was the preponderance of the evidence standard. This is sufficient for us to apply the presumption of official duty

regularly performed (Evid. Code, § 664) and conclude the court followed the law and applied the correct standard of proof (*Ross v. Superior Court* (1977) 19 Cal.3d 899, 913; *People v. Woods* (1993) 12 Cal.App.4th 1139, 1152). We also conclude Mother has failed to carry her burden to overcome the presumption. (See *People v. Tang* (1997) 54 Cal.App.4th 669, 677 [judgments are presumed correct].)⁸

Mother next argues that her section 388 petition established the requisite changed circumstances because it alleged Father had moved out of the home and she was living there alone. She also argues that granting the petition was in the minors' best interests.

"In evaluating whether the petitioner has met his or her burden to show changed circumstances, the trial court should consider: '(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been.' [Citation.]" (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1229.)

Here, the dependency arose due to A.R.'s sexual abuse by the minors' adult brother, Parents' history of permitting the minors to engage in and witness inappropriate sexual material and activity, Father's history of physical and emotional abuse of Mother, and Mother's failure to intervene in Father's plan to take unidentified children hostage. At the 12-month review hearing the social worker noted that, although Parents had complied with their case plans, Mother's therapist was concerned about Mother's passivity regarding decisions around the minors and Mother's dependency on Father. The therapist also stated that Mother was "severely limited in her ability to gain insight through individual psychotherapy." Father continued to be sexually inappropriate around the minors and yell at Mother regarding decisionmaking. The therapist concluded that,

⁸ Mother's reliance on *In re Henry V.* (2004) 119 Cal.App.4th 522 is misplaced. In that case, there was no indication on the record that either the court or the Agency understood that the matter before it was subject to the clear and convincing standard. (*Id.* at p. 530.) Here, the court was apprised of the correct standard.

although Parents love the minors, they do not make sound and safe decisions to ensure the minors' safety.

At the section 388 hearing, social worker Ferlatte said she could not confirm or deny that Father was still living with Mother, Father had not provided a change of address, and Mother told her to contact Father at Mother's address. In addition, Parents had no plans to divorce and Mother said Father had done nothing to cause her to tell him to move out. Although Mother had a choice to have visits with the minors separate from Father, she preferred longer joint visits with Father rather than shorter visits without him. Ferlatte testified that, even if Father were out of the home, it was not in A.R.'s interest to be returned to Mother because more time was necessary to assess Mother's ability to protect T.R. and interact with A.R. Social worker Arnsbarger, who testified on Mother's behalf, had never met the minors or Father, and knew nothing of A.R.'s mental health status or special needs.

Mother argues that the problems, such as her inability to stand up to Father, were alleviated when Father moved out of her home, which she asserts was "the ultimate sacrifice which resulted in profound and significant change to her life." Mother's argument is misplaced. Given Mother's apparent emotional attachment to Father as of the filing of the section 388 petition and the vagaries of Father's current living situation, the court had reason to question whether in fact Father had moved out of Mother's home. Assuming Father had moved from Mother's home, the record before us supports the court's exercise of discretion determining that modifying its orders in response to any changed circumstances would not be in the minors' best interests. Despite all of Mother's accomplishments in complying with her reunification plan, the evidence established that it was not in the minors' interests to be returned to Mother because more time was necessary to assess Mother's interactions with A.R. and more time was necessary to assess Mother's ability to care for T.R. and protect her from Father.

In view of Parents' current circumstances and the minors' needs, the court reasonably concluded it was not in the minors' best interests to be returned to Mother's

care. Mother has failed to demonstrate the court abused its discretion in denying her section 388 petition.

II. *The Continuing Beneficial Relationship Exception Does Not Apply*

Mother also contends the continuing beneficial relationship exception (§ 366.26, subd. (c)(1)(B)(i))⁹ applies to prevent termination of her parental rights over A.R.

At a .26 hearing, where possible, adoption is the permanent plan preferred by the Legislature. (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 947.) Where the court finds a minor cannot be returned to his or her parent and is likely to be adopted if parental rights are terminated, it must select adoption as the permanent plan unless it finds that termination of parental rights would be detrimental to the minor under one of six enumerated exceptions. (§ 366.26, subd. (c)(1)(B); see *In re L. Y. L.*, at p. 947.) “While it is the child welfare agency’s burden to prove a likelihood of adoption [citation], the burden is on the parent or parents to establish the existence of one of the circumstances that are exceptions to termination. [Citation.]” (*In re Thomas R.* (2006) 145 Cal.App.4th 726, 731.)

Subdivision (c)(1)(B)(i) of section 366.26 provides that if the juvenile court finds the child adoptable, “(c)(1) . . . the court shall terminate parental rights and order the child placed for adoption . . . unless . . . [¶] (B) The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.”

In *In re Autumn H.* (1994) 27 Cal.App.4th 567, the court interpreted the beneficial relationship exception to mean “the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child

⁹ Formerly section 366.26, subdivision (c)(1)(A). (See Stats. 2005, ch. 640, § 6.5.)

relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated.” (*Id.* at p. 575.) Factors which affect the parent/child relationship, such as the child's age, the portion of the child's life spent in the parent's custody, the effect of the interaction between the parent and child, and the child's particular needs, may be considered by the court in considering the applicability of the beneficial relationship exception. (*Id.* at pp. 575-576; accord, *In re Zachary G.* (1999) 77 Cal.App.4th 799, 811.) “[T]he relationship must be such that the child would suffer detriment from its termination. [Citation.]” (*In re Angel B.* (2002) 97 Cal.App.4th 454, 467.)¹⁰

The trial court's determination regarding the beneficial relationship exception is upheld if supported by substantial evidence. (*In re B.D.*, *supra*, 159 Cal.App.4th at p. 1235.) In conducting our substantial evidence review, we review the evidence most favorably to the prevailing party and indulge all legitimate and reasonable inferences to uphold the court's ruling. (*Ibid.*)

Mother contends that under the *In re Autumn H.* standard, sufficient evidence was presented to establish the beneficial relationship exception. She argues that she never missed a visit with the minors; she was appropriate, loving and attentive at each visit and throughout the dependency she and the minors remained bonded.¹¹

¹⁰ Mother asserts that “case law interpretation of the [beneficial relationship exception] misconstrues the plain meaning of the statute, is frankly unjust, and should be rejected or modified by this court.” She cites *In re Autumn N.*, *supra*, 27 Cal.App.4th 567, *In re Beatrice M.* (1994) 29 Cal.App.4th 1411 “and the cases which followed” as “creat[ing] a standard where the court can deem a close, affectionate parental bond insufficient and require proof of a ‘parental’ relationship after the parent is no longer permitted to play such a role.” We decline Mother's request that we reject the well-established and well-reasoned body of law set forth in *In re Autumn N.* and its progeny.

¹¹ For the first time on appeal Mother argues that there was no current, relevant professional assessment of A.R.'s emotional or psychological condition or testimony thereon at the .26 hearing. Mother's failure to raise this issue below constitutes a waiver of the issue on appeal. (*In re Aaron B.* (1996) 46 Cal.App.4th 843, 846.)

In this case, the record clearly established that Mother maintained regular visitation with A.R. The issue here is the second prong of the continuing beneficial relationship exception: whether A.R. would benefit from continuing the parental relationship with Mother. We conclude that substantial evidence supports the court's finding that Mother failed to establish a parent-child relationship sufficient to qualify for the section 366.26, subd. (c)(1)(B)(i) exception as interpreted by *In re Autumn H.* and its progeny. The evidence establishes that Mother has difficulty making decisions for the minors without Father. A.R. has developed strong relationships with her foster parents and they hope to adopt her. Within this setting, A.R. has been able to heal from her past abuse and posttraumatic stress disorder. While with her foster parents, A.R. appeared outgoing, expressive and joking; at family visits she appeared quieter and less assertive of her personality and needs. At one family visit, A.R. was made visibly uncomfortable because Parents made several references to the older brother who sexually abused her. Based on observations made at the visit, the social worker stated that it did not appear that A.R. was strongly bonded to Parents and did not look to them to meet her needs. Thus, the social worker opined that it would not be detrimental to A.R. to terminate parental rights. In addition, the adoptions social worker opined that adoption is more important than A.R.'s continued contact with Mother because A.R. needs the stability and permanency of adoption. The adoptions social worker stated that A.R.'s need for permanency and stability outweighs any of the statutory exceptions to adoption.

In addition, the cases Mother relies on are distinguishable. In *In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1533, the Court of Appeal upheld the trial court's determination that termination of parental rights would be detrimental to the children. Therefore, *In re Brandon C.* does not support Mother's argument that there is no substantial evidence to support the court's determination that the continuing beneficial relationship exception does not apply as to A.R. In addition, in *In re Brandon C.*, evidence was presented that there was a close bond between mother and the children, and that a continuation of contact would be beneficial to the children. (*Id.* at p. 1537.) In *In re S.B.* (2008) 164 Cal.App.4th 289, 300-301, the evidence established that the child

loved her father, wanted their relationship to continue, and derived some measure of benefit from his visits; and, the father maintained a parental relationship with the child and had consistent contact and visitation. The Court of Appeal concluded that the child would be greatly harmed by the loss of her significant, positive relationship with the father. Here, the evidence suggests no such close bond between A.R. and Mother and establishes that termination of the mother/child relationship would not be detrimental to A.R. We conclude substantial evidence supports the trial court's determination that the continuing beneficial relationship exception does not apply as to Mother's relationship with A.R.

III. *The Sibling Relationship Exception Does Not Apply*

Next, Mother contends the court erred in not applying the sibling relationship exception to termination of her parental rights over A.R. (§ 366.26, subd. (c)(1)(B)(v).)

“[T]he Legislature intended the courts under the section 366.26, subdivision (c)(1)(B)(v) exception to balance the benefit of the child's relationship with his or her siblings against the benefit to the child of gaining a permanent home by adoption in the same manner the court balances the benefit of the child's continued relationship with the parent against the benefit to the child of gaining a permanent home by adoption when considering the section 366.26, subdivision (c)(1)(B)(i) exception. The court must balance the beneficial interest of the child in maintaining the sibling relationship, which might leave the child in a tenuous guardianship or foster home placement, against the sense of security and belonging adoption and a new home would confer. [Citation.]

[¶] Under section 366.26, subdivision (c)(1)(B)(v), the court is directed first to determine whether terminating parental rights would substantially interfere with the sibling relationship by evaluating the nature and extent of the relationship, including whether the child and sibling were raised in the same house, shared significant common experiences or have existing close and strong bonds. [Citation.] . . . [¶] To show a substantial interference with a sibling relationship the parent must show the existence of a significant sibling relationship, the severance of which would be detrimental to the child.” (*In re L. Y. L.*, *supra*, 101 Cal.App.4th at pp. 951-952, fn. omitted.) In making its

determination on the sibling relationship exception, the court may consider only the possible benefits and detriments to the child being considered for adoption, not the child's siblings. (*In re Celine R.* (2003) 31 Cal.4th 45, 54.) Like the other section 366.26, subdivision (c)(1)(B) exceptions to adoption, the sibling relationship exception must be considered in light of the legislative preference for adoption, which remains the "norm." (*Celine R.*, at p. 53.)

We review the court's determination as to whether the sibling bond exception to termination of parental rights applies under the substantial evidence standard. (*In re Jacob S.* (2002) 104 Cal.App.4th 1011, 1017, disapproved on other grounds in *In re S.B.* (2009) 46 Cal.4th 529, 537 & fn. 5.)

Mother argues that the "only" evidence regarding lack of a sibling bond between A.R. and T.R. is the Agency's assessment that the minors are not "exceptionally close," and when A.R. attempts to engage T.R., T.R. "tends to dismiss her or find her annoying." Mother argues that there was "overwhelming evidence that a bond existed between these girls" but does not specify what that evidence is or cite to the record. She also argues there is no evidence that ongoing contact between the minors would be detrimental to A.R. or that such contact would be assured after A.R.'s adoption. She concludes that, at the least, the court should have postponed termination of her rights over A.R. until an evaluation of the sibling bond was made and considered.

We conclude Mother has failed to show that the court's decision to reject the sibling relationship exception was not supported by substantial evidence. The record supports the court's determination that the minors' sibling relationship did not outweigh A.R.'s need for the permanency of adoption. The evidence establishes that the minors, who are six and one-half years apart in age, engaged in inappropriate sexual behaviors together prior to the dependency. While initially placed together in foster care, there was concern regarding inappropriate sexual contact between the minors and their negatively influencing each other. Once they were placed separately, their behaviors improved and their sexualized behaviors decreased. There was resentment between the minors because Mother significantly favored T.R. over A.R. The evidence also established that the

minors have a good relationship, but not an exceptionally close relationship. The Agency social workers and the court thoughtfully addressed whether the detriment due to interference with the sibling relationship caused by termination of parental rights over A.R. would outweigh the benefits of permanency and stability of A.R.'s adoption. (See *In re L. Y. L.*, *supra*, 101 Cal.App.4th at pp. 951-953.) After doing so, they concluded that a long-term guardianship would leave A.R. uncertain about her future and exacerbate her anxiety regarding it. The evidence also established that, while the minors have a good relationship, A.R.'s need for long-term permanence and stability outweighed any detriment to her in severing the minors' sibling relationship.

In addition, it was appropriate for the court to consider the prospective adoptive parents' willingness to maintain the sibling relationship. Where evidence exists that sibling contact will continue after termination of parental rights, even if such future contact is not guaranteed, the court may consider the sibling contact in determining whether parental termination would substantially interfere with the sibling relationship and whether such interference would outweigh the benefits of adoption. (See, e.g., *In re Valerie A.* (2007) 152 Cal.App.4th 987, 1014; *In re Jacob S.*, *supra*, 104 Cal.App.4th at p. 1019; *In re Megan S.* (2002) 104 Cal.App.4th 247, 254.) Here, the evidence that A.R.'s prospective adoptive parents would support and likely continue the minors' sibling contact supports the court's implied determination that any potential interference with the sibling relationship that might result from the termination of parental rights did not outweigh the benefits to A.R. of adoption.

IV. *Any Error in Finding T.R. Adoptable Is Harmless*

Finally, Mother contends substantial evidence does not support the trial court's finding that T.R. is adoptable. She concedes that the court ordered that T.R. remain a dependent of the court and ordered long-term foster care as T.R.'s permanent plan. However, she argues that the court's adoptability finding "risk[s T.R.'s] status as a legal orphan" and argues the court's "decision" should be reversed and the matter remanded.

Mother fails to acknowledge that the court did not terminate her parental rights over T.R. or terminate her visitation with T.R. She also fails to acknowledge that the

court's form order from the .26 hearing did not check the box stating a finding that T.R. was likely to be adopted. Finally, Mother fails to establish how T.R. could be a "legal orphan" or Mother suffered any harm as a result of the court's statement given that Mother's parental rights over T.R. were not terminated. Consequently, even if the court's statement was error, it was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

DISPOSITION

The orders are affirmed.

SIMONS, J.

We concur.

JONES, P.J.

BRUINIERS, J.*

* Judge of the Contra Costa Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.